86 1889

No.

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

OSCAR DIAZ-ALBERTINI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DENNIS J.C. OWENS, ESQUIRE
(Counsel of Record)
RAYMOND, RAYMOND & OWENS
1820 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 221-5062
Counsel for the Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

I

Does a trial judge have a responsibility to inform counsel of statements made by a venireman in the courtroom, but out of hearing of the Petitioner's attorneys, when those statements directly contradict *voir dire* answers and are clearly grounds to strike for cause?

II

Does the detention of the Petitioner at a document-check roadblock violate his constitutional rights when the roadblock's ostensible purpose was to check New Mexico licenses, registration and insurance and the Petitioner had valid Florida and California documents, but the Petitioner's being a Hispanic-American placed him in an ethnic or racial group subject to special scrutiny by the New Mexico police?

TABLE OF CONTENTS

Questions Presented I
Table of Contents II
Table of Authorities III
Opinions Below 1
Jurisdictional Grounds 1
Constitutional Provisions 1
Statement of the Case 2
Argument 9
Conclusion 24

Appendix—

Tenth Circuit Opinion A1
Denial of Rehearing A11
Transcript of March 9, 1984 Pre-Trial Proceedings (Pre-Tr. I) A12
Transcript of March 14, 1984 Pre-Trial Proceedings (Pre-Tr. II) A15
Transcript of Jury Selection (J.S.) A20
Trial Transcript of April 9, 1984 (Tr. I) A22
Trial Transcript of April 10, 1984 (Tr. II) A25
Transcript of May 11, 1984 Post-Trial Proceedings (Post-Tr. I) A26
Transcript of June 1, 1984 Post-Trial Proceedings (Post-Tr. II) A28

TABLE OF AUTHORITIES

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 21
Carroll v. United States, 267 U.S. 132 (1925) 21
Casias v. United States, 315 F.2d 615 (10th Cir. 1962) 9
Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962) 21
Davis v. Mississippi, 89 S.Ct. 1394 (1969) 19
Delaware v. Prouse, 440 U.S. 648 (1979) 15
Fabian v. United States, 358 F.2d 187 (9th Cir. 1966) 11
Florida v. Royer, 75 L.Ed. 2d 229 (1983) 18
Garrett v. Goodwin, 569 F.Supp. 106 (1982) 19, 20, 21
Johnson v. Hill, 275 F.2d 110 (8th Cir. 1960) 10
Meadows v. State, 620 S.W.2d 636 (1980) 21
City of Miami v. Aronovitz, 114 So.2d 784 (Fla. 1959) 21
Mills v. Wainwright, 415 F.2d 787 (5th Cir. 1969) 19
Nakamoto v. Fasi, 635 P.2d 925 (1978) 21
Rodriquez v. State, 559 S.W.2d 925 (1978) 20
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 21
Terry v. Ohio, 392 U.S. 1 (1968) 20
United States v. Abbott, 546 F.2d 883 (1977) 22, 23
United States v. Berry, 670 F.2d 583 (5th Cir. 1982) 19
United States v. Dellenger, 472 F.2d 340 (7th Cir. 1972) 11
United States v. Gooding, 695 F.2d 78 (7th Cir. 1982) 19
United States v. Harris, 530 F.2d 576 (4th Cir. 1975) 10
United States v. Haynes, 398 F.2d 980 (2nd Cir. 1968) 9
United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) 21
United States v. Obregon, 748 F.2d 1371 (10th Cir.) 15
United States v. Prichard, 645 F.2d 854 (10th Cir. 1981) 15
United States v. Recalde, 761 F.2d 1448 (10th Cir.) 17
United States v. Robinson, 690 F.2d 869 (11th Cir. 1982) 19
United States v. Ross, 456 U.S. 798 (1982) 20

United States v. Schiavo, 504 F.2d 1 (3rd Cir. 1973) 13
Wong Sun v. United States, 371 U.S. 471 (1963) 19
Fourth Amendment, Constitution of the United States 2, 16, 19, 21
Sixth Amendment, Constitution of the United States 2
Fourteenth Amendment, Section One, Constitution of the United States 2, 19

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

OSCAR DIAZ-ALBERTINI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

This case has previously been heard in the United States District Court for the District of New Mexico (D.C. Criminal Number 84-43-1) and the United States Court of Appeals for the Tenth Circuit (Slip op. 84-1818).

JURISDICTIONAL GROUNDS

Jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1) and is sought upon the denial of a rehearing en banc, such denial being entered on March 24, 1987 by the United States Court of Appeals for the Tenth Circuit.

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process to obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 11, 1984, the petitioner, Oscar Diaz-Albertini and his wife, Therese Diaz-Albertini, were found guilty after a joint trial by jury of one count of violating Title 21, U.S.C. §841(a)(1) (possession of cocaine with intent to distribute). On June 1, 1984, their motion for a new trial, predicated upon juror misconduct, was granted with respect to Mrs. Albertini and denied with respect to the petitioner, Mr. Albertini. Mr. Albertini was sentenced to confinement for 10 years.

On January 30, 1984, Mr. and Mrs. Albertini were driving West on Interstate Highway 40 in New Mexico. Shortly after 2:00 p.m., the Albertinis came upon a roadblock set up by the New Mexico State Police approximately 50 miles from Santa Fe, New Mexico (Pre-Tr. H. I., p.26).

The roadblock had been requested by Officer Jeff Faison, and authorized by Sergeant Arthur Page, both of the New Mexico State Police. According to the testimony of Officer Faison, *the purpose of the roadblock was to check* driver's licenses, registrations and insurance papers of *vehicles that are registered in New Mexico* (Pre-Tr. H. I., p.25). Officer Faison stated that there had been no tip that Mr. Albertini was engaged in criminal activity (Tr. I., p.61).

Mr. Albertini was driving a white 1979 Chevrolet station wagon. The Albertinis stopped at the roadblock and Mr. Albertini was directed by Sergeant Page to produce his driver's license and the car's registration (Pre-Tr. H. I., pp.26, 27). Mr. Albertini's driver's license, which had

been issued by the State of Florida, and the car's registration, which was issued by California, appeared to Sergeant Page to be in order (Pre-Tr., H. II., p.32). Sergeant Page stated that he then handed the license and registration to Officer Faison (Pre-Tr. H. II., p.36).

Officer Faison noted that Mr. Albertini's Florida license listed a Miami address and that the car was registered in the name of Terry Montero of California (Pre-Tr. H. I., p.28). This prompted Officer Faison to run an N.C.I.C. (National Crime Information Center) check on the car to determine whether it was registered as stolen. It was not (Pre-Tr. H. I., p.29).

Although Mr. Albertini's license was in order and the N.C.I.C. check of the vehicle was negative, Officer Faison physically retained both the driver's license and the vehicle registration, effectively denying Mr. Albertini the opportunity to leave. Officer Faison then decided to search the Albertinis' car.

The basis of Officer Faison's determination to search the car did not come from anything incident to the detention of the Albertinis at the roadblock, but resulted instead from the fact that Mr. Albertini was of Cuban decent, lived in Florida, and was driving a car with California license plates. In short, Mr. Albertini fit Officer Faison's stated "profile" of a drug smuggler.

The immediately ensuing events were in dispute during the suppression hearing. Officer Faison testified that he asked Mr. Albertini for permission to search the car and that Mr. Albertini gave him permission (Pre-Tr. H. I., p.29). Mr. Albertini stated that he signed a form attached to a clipboard (of which Faison never relinquished control) and that Faison, pointing to a signature line, in-

dicated that the form was for his (Faison's) protection (Pre-Tr. H. II., pp. 55-58). Mr. Albertini was not given an opportunity to read the form or to retain a copy of it. Mr. Albertini's account of this occurrence was confirmed by the only other witness, Mrs. Albertini (Pre-Tr. H. II., p.96).

After obtaining Mr. Albertini's signature on the consent form, Officer Faison commenced his search of the car (Tr. I., p.39; Tr. I., p.154; Tr. II., p.55). Officer Faison did not remember what part of the car he searched first, but at some point, the officer asked Mr. Albertini to assist him in opening the tailgate of the stationwagon, and the petitioner complied (Tr. I., p.39).

After gaining access to and searching the back area of the car, Officer Faison states that he tapped the tailgate, and that it "sounded solid" (Tr. I., p.41). He then pulled back the covering on the inside of the tailgate and began unscrewing the metal plates. The officer found cocaine (Tr. I., p.42). Officer Faison then arrested the Albertinis (Tr. I., p.71).

The jury selection for the trial of Mr. and Mrs. Albertini commenced at 9:50 a.m. on April 9, 1984, in the United States District Court for the District of New Mexico, before Judge Howard Bratton. The attorneys for Mr. and Mrs. Albertini were present. Also present was a venireman named Paul M. Chavez. On *voir dire*, Judge Bratton asked the following question of the prospective jurors: ". . . are you closely associated with or close friends with somebody who's in law enforcement, say your next-door neighbor or something like that?" (J.S., p.14). The only response to this question was from a venireman named Hammon, who states that he was well

acquainted with the State Police (J.S., p.15). Paul M. Chavez, who was subsequently chosen to serve as a juror in the Albertini case, said nothing.

At 10:32 a.m., jury selection began in an unrelated case, *United States v. Earl Largo,* in the same courtroom with the same judge (Criminal Case No. 83-261). None of the counsel involved in the Albertinis' case, including Mr. William Clay, the trial attorney for Mr. Albertini, were present for the *Largo voir dire* (Post-Tr., I., p.4). Paul M. Chavez and the other jurors for the Albertinis' case remained in the courtroom (J.S., p.25). During this second *voir dire,* Judge Bratton asked if any of the jurors or their immediate families were engaged in law enforcement activity (J.S., pp. 30-31). Several jurors responded to the question affirmatively. Among them was Paul M. Chavez, who stated that he had a "close acquaintance with the State Police . . ." (J.S., p.32). No further questions were asked of Mr. Chavez.

When the trial of the Albertinis commenced, neither Mr. Lawrence Arnkoff, the attorney for Mrs. Albertini, nor Mr. Clay, the attorney for Mr. Albertini, were aware of the statement made by Mr. Chavez during the second *voir dire.* The only person who could advise them of Mr. Chavez's statement was Judge Bratton. He remained silent. At no time prior to, during, or after the trial did Judge Bratton make any attempt to advise counsel of the response given by Mr. Chavez during the *voir dire* in the *Largo* case.

Mr. Chavez later testified at a post-trial hearing that he had known Officers Christian and Toler (who were present at the roadblock the day the Albertinis were arrested) for some years (Post-Tr. II., pp.17-18), had known

Officer Faison for 5 or 6 years (Post-Tr. II, p.17) was a neighbor and close friend of another New Mexico State Police Officer for 16 years (Post-Tr. II, pp.16-17), that he had been a close friend of a witness, Officer Arthur Page, for some 20 years (Post-Tr. II., p.17), and was the *godfather of Sergeant Page's child* (Post-Tr. II., p.19).

On May 11, 1984, a hearing was held in the courtroom of Judge Bratton on the supplement to Defendant's Motion for New Trial (Document No. 28, Designation of Record on Appeal). Mr. Clay's testimony (Post-Tr. I., pp.4, 6-7) and his statements in Mr. Albertini's response to the government's motion to proceed to sentencing were to the effect that he was summoned back into the courtroom after the *Largo* jury selection was completed. His attention was devoted to the opening statement that he would be giving on behalf of Mr. Albertini in a few moments. In the few seconds immediately prior to his entering the courtroom, Mr. Clay had a brief contact with defense counsel in the *Largo* case, who was leaving the courtroom. Because his attention was on more urgent matters, Mr. Clay did not recall the substance of the conversation, but remembered that he did learn to his surprise that the jurors for the *Albertini* case had remained in the courtroom during the *Largo* selection process. He remembers no statements which caused him any specific concern, a fact ignored by the Tenth Circuit, but did form an impression that because the *Albertini* jurors stayed in the courtroom while *voir dire* was conducted in the *Largo* case, the selection process should be examined for possible error in the event of a conviction. Mr. Clay had been particularly concerned with the jury selection process because he had never been exposed to

the practice of federal judges conducting *voir dire* examinations.

At the continuation of the hearing, Judge Bratton found cause to grant a new trial to Mrs. Albertini based on the failure of juror Chavez to answer appropriately (Post-Tr. II., p.31). However, Judge Bratton found that there had been ". . . a conscious waiver by [Mr. Clay] as to any impropriety or misanswer by the juror in question." (Post-Tr. II, p.32) Judge Bratton based his decision as to Mr. Albertini primarily on Mr. Clay's statements to the effect that he had considered examining the selection process for error in the event of a conviction. Of Mr. Clay's statements, the Judge said, "That is, in my judgment, a conscious decision where he had a basis for going further and looking into the juror and getting the juror excused and deciding to do nothing about it until after conviction" (Post-Tr. II, p.33).

Mr. Clay stated in his response to the government's motion to proceed to sentencing that he did not know of any withholding of information by any juror until after the trial. It was then that he was informed of juror Chavez's conduct by Mr. Arnkoff (attorney for Mrs. Albertini) who had read the transcript of the *Albertini* and *Largo* jury selection proceedings. Again, these facts were ignored in the opinion handed down by the Tenth Circuit.

ARGUMENT OF PETITIONER

The conduct and bias of juror Chavez, and the trial court's lack of response to it, give rise to the first issues which should prompt this Court to take this case. These are due process issues: questions as to the basic fairness of the trial itself, and questions left unanswered by the Tenth Circuit.

The preliminary question is whether Chavez can be said to have been biased as a juror because of his relationship with various New Mexico State Police Officers. At the conclusion of the post-trial motion hearing for Mrs. Albertini, the appellant's co-defendant, the trial court threw out her conviction based on Chavez's failure to respond during the *Albertini voir dire* and Chavez's relationship with the New Mexico State Police. In effect, *Judge Bratton found Chavez to be partial.* Given the discretion normally afforded trial judges on these matters, this fact alone should be dispositive of the question. A relationship which a prospective juror has or has had may support a challenge to that person as a juror because of bias. *United States v. Haynes,* 398 F.2d 980, 984 (2nd Cir. 1968); *Casias v. United States,* 315 F.2d 615 (10th Cir. 1962).

Applying this test to the case of juror Chavez was not difficult. Chavez had been friends with and a next-door neighbor to a New Mexico State Police Officer named Bilbiano for some 16 years. He knew Officers Christian and Toler who were on the roadblock the day of the petitioner's arrest. He had known Officer Faison, the arresting officer, for some years. He had known Sergeant Page, who also testified at trial, for some 20

years. Chavez was the godfather of Page's child. These factors would make for bias in the average person.

Chavez was required to judge the credibility of the witnesses. The other members of the jury were required to come to conclusions as to credibility with the participation of Chavez. The other jurors did not know of Chavez's relationships and did not realize how he might skew their deliberations with his "natural", secret bias. A truthful and appropriate response by Chavez would have provided grounds for a challenge for cause. By granting a new trial to Mrs. Albertini, the trial judge was indicating that he would have granted such a challenge for cause. Thus, it must be concluded that Mr. Albertini was convicted by a jury which included a juror whose relationship did give rise to prejudice for the state and against those prosecuted.

The Tenth Circuit, rather than focusing on these issues, limited itself to the issue of the supposed waiver of any complaint as to juror Chavez by Mr. Albertini. When considering *all* of the relevant facts, however, it becomes apparent that there was, in fact, no such waiver.

There *may* be a waiver of the right to have an impartial and unbiased jury by a failure to object to the presence on that jury of a person whose objectivity is later questioned *if* the party learns of the grounds for challenge but does not make the challenge when he still could. There are numerous cases on this point. In one, a defendant waited until after his conviction to announce that one of his jurors knew him before trial. It was held that waiver had occurred. *United States v. Harris,* 530 F.2d 576 (4th Cir. 1975). In a civil case, *Johnson v. Hill,* 275 F.2d 110 (8th Cir. 1960), the defendant's attorney was informed prior to trial that a certain juror had been a

plaintiff in a personal injury suit. The juror failed to respond appropriately on *voir dire*, and counsel took no action until there had been an adverse verdict. The appellant was held to have waived his right to challenge the fairness of the proceeding.

There are other cases in which attorneys were put on notice of possible bias, such as where a panel member made an outrageously prejudicial comment during *voir dire*, and no move was made for mistrial or for a hearing to determine prejudicial effect, *Fabian v. United States*, 358 F.2d 187 (9th Cir. 1966). The fact which these cases have in common is that, either the defendant or his attorney *actually knew* that there was a problem of partiality in a particular juror and knew *what* the problem was. In these cases, notice to the attorneys was obvious and completely uncontradicted on the face of the record.

In contrast, turning to the facts of the instant case, there is no question that an attorney of even minimal competence (far less than that which Mr. Clay, the petitioner's trial counsel, exhibited at trial) would have challenged Chavez for cause *had he known* of Chavez's relationship with the police officers. Indeed, so important is the lack of any relationship between jurors and police officers that questioning in this area on *voir dire* has been held to be essential to a fair trial. *United States v. Dellenger*, 472 F.2d 340, 369 (7th Cir. 1972).

The record clearly establishes that Chavez was so biased and prejudiced that *the petitioner's trial was not fair with Chavez on the jury.* The record does not establish waiver by Mr. Albertini or his counsel because there was no convincing evidence that they actually knew of Chavez's prejudicing relationships. Without that knowledge, Mr. Albertini and his attorney were incapable of

waiving his objection to Chavez's presence. Thus, there was prejudice, but there was no waiver.

The Tenth Circuit erred in upholding the trial judge's determination that Mr. Albertini had waived his right to a fair trial. This analysis is compelled on two distinct grounds. First, while it is uncontroverted that Mrs. Indritz (a public defender present when Mr. Chavez made his prejudicial statement during the second *voir dire*) made some statement pertaining to the jury to Mr. Clay (Albertini's attorney) as he was walking into the courtroom, it is equally uncontroverted that Mr. Clay did not hear or understand what was said. Mr. Clay's impressions of what he was told are crucial. No facts have ever established that Mr. Clay knew the full thrust of the information related to him. Without that knowledge, he could not make a conscientious waiver of Mr. Albertini's right to a fair trial. The strongest evidence supporting Mr. Clay's claim of lack of knowledge is the fact that he did not bring up the matter of juror Chavez in the original motion for new trial. This matter was not raised until several days later, in a supplement to the motion for new trial. The delay was because *no attorney involved in the Albertini case* knew of the statement until Mr. Arnkoff, Mrs. Albertini's lawyer, read the transcripts of both the *Albertini* and *Largo voir dires*. This fact flies in the face of the finding of Judge Bratton, which the Tenth Circuit accepted without reservation, that Mr. Clay had knowledge of juror Chavez's prejudicial statement prior to the commencement of trial but chose to keep it in his "hip pocket" for later use in the event of conviction. This finding is illogical in the extreme. Had Mr. Clay in fact known of Chavez's bias and simply held back his challenge as a "sandbagging" tactic, the challenge would *certainly* have figured prominently in the motion for new trial! There

is no logical explanation why Mr. Clay would have withheld such information until after the expiration of the time for a new trial motion (the challenge of juror Chavez was made after time in a supplement to the motion for new trial which was clearly within the discretion of the trial court to reject). The only logical explanation for the delay of the challenge to juror Chavez is that neither Albertini nor his lawyer knew of Chavez's prejudice until after the time for filing a motion for new trial had run out. During the trial of the Albertinis, only two people in the courtroom knew: Chavez and Judge Bratton.

The second line of the analysis rests on the duty of Judge Bratton to insure a fair trial. When the parties for the *Albertini* case returned to the courtroom after the *Largo voir dire,* Judge Bratton had no knowledge of any warning concerning juror Chavez which had been made to Mr. Clay. Judge Bratton only knew that Chavez had made prejudicial statements out of the hearing of counsel. At the moment that Albertinis returned to the courtroom to commence their trial, Judge Bratton was duty bound to inform them, through their counsel, of Chavez's statement. He failed to do so. This failure tainted every subsequent event, most importantly, Mr. Albertini's conviction!

It is the judge's duty to insure that the selection process is fair. "The Sixth Amendment imposes a duty on the district courts . . . to take reasonable measures to ensure defendants fair trials, free of prejudice and disruption." *United States v. Schiavo,* 504 F.2d 1, 6 (3rd Cir. 1973), cert. denied, 419 U.S. 1096. When Judge Bratton heard Chavez's response, he knew that Mr. Albertini and his lawyer were not present in the courtroom. Yet, he did not take any action to warn them of Chavez's answers, fraught with bias. This was a fundamental

error. The granting of a new trial to Mrs. Albertini was an unequivocal indication that Judge Bratton viewed Chavez's answers as disqualifying. A trial judge has a duty, not to any party, but to the process of fair, public, speedy and impartial trials. The trial judge is the only person in a trial with a duty to fairness itself. Judge Bratton had a duty to inform Mr. Albertini and his counsel that one of their jurors had relationships with the police. Judge Bratton failed in that duty. Mr. Albertini's conviction rests on error.

We find no cases on the specific point of a trial judge's responsibilities in this situation. The judge conducted the *voir dires*. For some reason, two *voir dires* were conducted, with the panel members selected for the *Albertini* case still present when the *Largo* jury questioning was done. Chavez's answers were obtained when he answered during the *Largo* questioning to inquiries which he had ignored during his own questioning, the *Albertini voir dire*. The likelihood of the recurrence of this situation grows daily as more and more Federal District Judges adopt this method of conducting *voir dire*.

The Supreme Court should have its sense of injustice evoked by this turn of events.

A second set of issues concerns the trial court's refusal to suppress the crucial evidence. These are also due process issues which have at their heart a citizen's constitutional freedom from unreasonable searches and seizures.

The search during which the cocaine was seized was warrantless. Most importantly, the search was made only because Mr. and Mrs. Albertini had been singled out because they fit a "profile" of drug smugglers. The Tenth Circuit made several comments about the search, and

the incidents surrounding it, which are grossly at odds with existing law or are completely unsupported by the facts. Each of these is worthy of detailed comment.

The Tenth Circuit first concludes that the roadblock at which the Albertinis were stopped was not pretextual. This conclusion is immediately followed by the statement that "[p]olice officers are not required to close their eyes to indications of possible wrongdoing that are disclosed at roadblocks." These conclusions are based on two previous Tenth Circuit decisions: *United States v. Obregon,* 748 F.2d 1371; and *United States v. Prichard,* 645 F.2d 854.

Several errors flow from these conclusions. The first error is that while the stated purpose of the roadblock may have been legitimate, the manner in which it was executed was clearly not. The facts, which are completely overlooked by the Tenth Circuit, compel this conclusion. According to the testimony of Officer Faison, *the purpose of the roadblock was to check* driver's licenses, registrations and insurance papers of *vehicles that are registered in New Mexico* (Pre-Tr. H. I., p.25). The car which Mr. Albertini was driving was registered in California and therefore not subject to the New Mexico requirements. Furthermore, both the registration and Mr. Albertini's driver's license, issued by the State of Florida, were found to be in order. Despite the lack of any irregularity in the documents obtained from Mr. Albertini, Officer Faison retained possession of the documents and proceeded to run an NCIC check on the vehicle. As the Supreme Court noted in *Delaware v. Prouse,* 440 U.S. 648, at 664 (1979).

> We hold that except in those situations in which there is at least articulable and reasonable suspicion that

> a motorist is unlicensed or that an automobile is not registered, or that the vehicle or occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver's license and the registration are unreasonable under the Fourth Amendment.

This decision makes it clear that without an articulable and reasonable suspicion of wrongdoing, the mere running of the NCIC check was violative of Mr. Albertini's Fourth Amendment rights. More importantly, however, even if it were conceded that the different states of origin of the driver's license and vehicle registration (this is not such a concession) constituted a reasonable suspicion, when the NCIC check proved negative, Mr. Albertini's detention should have immediately been terminated. Rather than return Mr. Albertini's documents so that he might proceed, Officer Faison continued to detain the Albertinis. As a result of this police misconduct, every subsequent event, including the consent to search, the search itself, and the discovery of contraband, were tainted. The Tenth Circuit erred in not so holding.

It is clear that while police officers are not required to close their eyes to indications of wrongdoing, it is equally clear that in this case the arresting officer's eyes saw nothing which equalled an articulable and reasonable suspicion that Mr. Albertini was unlicensed, that his automobile was not registered or that he or his wife were otherwise subject to arrest. What Officer Faison's eyes perceived, and upon which he based his suspicions, was an Hispanic-American from Florida driving to California. This type of suspicion, fraught with racial and ethnic bias and prejudice, was erroneously condoned by the Tenth Circuit.

Officer Faison, the arresting officer and the individual responsible for the detention of the Albertinis, testified that he had authored a class plan for New Mexico State Police Officers which clearly indicates that roadblocks are used to "detect narcotics on the highway". Officer Faison testified that he practiced what he preached. In fact, the roadblock at which the Albertinis were arrested was conducted according to the methods taught by Officer Faison. Possession of a Florida driver's license was stated to be grounds for suspicion in and of itself. Being a "Cuban or Columbian" was listed as one of the "three things that could key an officer to possible narcotics smuggling". If the roadblock in this case is sanctioned by the Supreme Court, it will become the law of the land that Cuban-Americans from Florida may be stopped, detained and coerced into permitting the police to search his or her automobile, luggage, and personal effects *simply because* they are Cuban-Americans from Florida. This decision must be overturned.

Another issue which arises from the warrantless search is that of consent. The Tenth Circuit rationalized the voluntariness of Mr. Albertini's consent without taking into account the requirements for a voluntary waiver. Indeed, the Tenth Circuit relied on its own decision in *United States v. Recalde*, 761 F.2d 1448. However, a careful look at that decision suggests error on the part of the Tenth Circuit.

As the court noted in *Recalde, supra*, "[t]he Supreme Court has consistently held that evidence obtained after an illegal arrest or seizure must be suppressed as the fruit of the illegal detention." That the Albertinis had been "seized" is hardly disputable. Mr. Albertini's driver's license and vehicle registration were taken from him and he was then ordered by uniformed police officers to drive

his automobile off the highway and onto the median strip. At that time, Mr. Albertini and his wife were not free to go and were, in fact, under arrest. While Mr. Albertini was fully aware of the fact that he was not free to go, he was handed a clipboard by the arresting officer and instructed to sign his name. He did as he was told. This situation is very similar to that present in *Florida v. Royer,* 75 L.Ed. 2d 229 (1983).

In that case, Royer was confronted by two detectives in an airport solely because he fit a description provided by Drug Enforcement Administration of a drug courier. The officers requested Royer to produce his airline ticket and driver's license and he did so. The detectives did not return the ticket or the license but asked Royer to accompany them to a small room approximately 40 feet away. Royer went with them. The Supreme Court clearly understood that Royer had been "seized" in that he was not free to go, not having either his airline ticket or his driver's license and that the persons of authority who had obtained these from him were requesting that he go with them to a detention area. Without Royer's consent, a detective retrieved Royer's luggage from the airline and brought it to this room. Royer was asked if he would consent to the search of his suitcase. He produced a key and unlocked one of the suitcases. Further, Royer did not object when the detective pried open a second suitcase. Drugs were found in each piece of luggage. Then Royer was told that he was under arrest.

The Supreme Court of the United States recognized that Royer's actions which indicated consent were a product of the detectives' illegal detention of Royer. The detectives' actions exceeded the permissible bounds of an investigative stop. Even though he opened one suitcase and failed to object when the other suitcase was pried

open before he was told he was under arrest, the Court clearly understood and proceeded on the basis that he had been effectively arrested when his driver's license and airline ticket were taken away from him. The same is true of Mr. Albertini: he was effectively arrested when his driver's license and vehicle registration documents were taken from him. Any effort to obtain his "voluntary consent" thereafter would be futile because his consent was tainted by the illegal detention.

Royer is clearly applicable to Mr. Albertini's situation. The intensified and illegal police activity contaminated and tainted any alleged consent which resulted subsequent to and as a product of this activity. The fruits of such illegal activities on behalf of the police must be suppressed. *Davis v. Mississippi*, 89 S.Ct. 1394 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969). *United States v. Gooding*, 695 F.2d 78 (4th Cir. 1982); *United States v. Robinson*, 690 F.2d 869 (11th Cir. 1982); *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982).

A most instructive case is *Garrett v. Goodwin*, 569 F.Supp. 106 (1982). The opinion in that case includes a scholarly review of roadblock cases. After observing that the stop of a vehicle at a roadblock conducted for any purpose, including driver's license and vehicle registration check, is a seizure under the Fourth and Fifteenth Amendments to the Constitution of the United States, citing twelve decisions of the Supreme Court of the United States, the District Court proceeded to set forth principles by which we may determine whether or not that seizure is reasonable under the Fourth Amendment. It notes that there is a developing line of cases prohibiting stops for driver's license checks which are found to be a mere surreptitious subterfuge for a vehicle search, at 117:

> [A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope . . . The scope of a search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.

Terry v. Ohio, 392 U.S. 1, 18-19 (1968).

> Once a valid stop occurs, justification for a greater intrusion may arise. The officer may then gain cause to conduct a stop and frisk or probable cause for a search of the interior under the automobile exception or the search incident doctrine. The result of that intrusion may give probable cause to believe criminal evidence is in the trunk. Only then can a search of the trunk be initiated . . .

United States v. Ross, 456 U.S. 798, 822-25 (1982).

> Therefore, as a general rule, probable cause to search the trunk should not arise until the inference level of possession with intent to deliver a controlled substance were passed by what was found in the passenger compartment, which, in Arkansas in the case of marijuana, is one ounce.

Obviously, in this case, nothing appeared in plain view in the passenger compartment of the Albertini station-wagon which gave the officer probable cause to believe criminal evidence was inside the structure of the vehicle.

Consent obtained at a driver's license check roadblock, as any other consent, is presumptively involuntary, and valid consent must be proved by clear and convincing evidence. *Garrett v. Goodwin*, 569 F.Supp. 106-120 (1982); *Rodriquez v. State*, 559 S.W.2d 925 (1978). The State has a heavy burden of the inherently coercive circumstances

involved in a roadblock of the sort at which Mr. Albertini was stopped. To approve of consent searches without the most careful scrutiny would sanction official coercion. *Schneckloth v. Bustamonte,* 412 U.S. 218, 229 (1973). *City of Miami v. Aronovitz,* 114 So.2d 784 (Fla. 1959). The Kentucky case of *Commonwealth v. Mitchell,* 355 S.W.2d 686 (Ky. 1962), was quoted with approval for its observation that the Court was not "sanctioning the stopping of cars with ostensible or pretended purpose stated when in reality [the roadblock] is actuated by an ulterior motive not related to the licensing requirement, or is done as a pretext or is a subterfuge for circumventing the [probable cause requirement]," at 687.

Having observed that "any warrantless search of a vehicle is presumptively unconstitutional" and that the "burden is on the State to show legal justification" for a warrantless search, citing nineteen significant cases, the court in *Garrett v. Goodwin* observed, at 120,

> A vehicle is not subject to search at will. "[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973); citing *Carroll v. United States,* 267 U.S. 132 (1925).

The Fourth Amendment requires that the police cannot *request* a consent to search without at least a reasonable or articulable suspicion to believe there was contraband or criminal evidence where the police proposed to look. *Nakamoto v. Fasi,* 635 P.2d 925 (Hawaii Sup.Ct. 1981); *Meadows v. State,* 620 S.W.2d 636, 638 (1980); *United States v. McCaleb,* 552 F.2d 717 (6th Cir. 1977).

This requirement for obtaining consent was completely ignored by the Tenth Circuit.

If Mr. Albertini had in fact given a voluntary and uncoerced consent to search to Officer Faison, the law holds that the consent to search is logically limited in scope. Thus, if Mr. Albertini had consented to the search of the interior of the car, that consent did not include the removal of the unholstery covering of the tailgate of the vehicle and the subsequent dismantling of the structural components of the tailgate itself. One case which is truly applicable to the facts in this appeal is *United States v. Abbott*, 546 F.2d 883 (1977). In that case, the wife of the defendant stated that she would go home, try to find a key to the truck of a car which had been impounded by the police and then return because she intended to unlock the trunk and look for papers which would allow her to take possession of the vehicle. While she was gone, a police officer obtained a trunk key from the lining of her husband's coat pocket in his jail cell and delivered the key to another officer. The officer used that key to open the trunk and discovered a contraband weapon. Abbott was convicted of possessing that weapon. The government contended that Mrs. Abbott had consented to the search. The court held that while she may have implicity consented to the search of the automobile in her presence and with her assistance, this consent did not constitute unequivocable and specific consent to search the locked trunk in her absence. The Court noted that she had been surrounded by police officers and it was unlikely that she could search the car in privacy. "Such an atmosphere increases the burden of showing a free and uninhibited waiver and consent".

Applying the Rule of *Abbott* to the present facts, we find that if Mr. Albertini had consented to a search of

the interior of the automobile, he did not implicitly and explicitly give an unequivocal and specific consent that the car be dismantled and that its structure be searched. Inviting a police officer who is at your front door to come in and look for contraband may or may not be consent freely and intelligently given. But, it is only a consent to search the interior of that house. It is not a consent to take a pick and begin to break into the plaster of a wall of the house, to use a crowbar to lift planks in the floor or to otherwise proceed into the structure of the house itself. In effect, the officers began to tear apart the car which Mr. Albertini had been driving. The officers did not have a warrant for such a search. The officers did not have probable cause which would justify the issuance of such a warrant. The officers could make no claim that the warrantless search was justified by an exigency of time or circumstance nor required for the officer's personal safety.

The second application of *Abbott* is that Albertini's indication of consent was "made and taken in the shadow of authoritative control, a factor to always be considered when waiver of a fundamental right is to be considered", at 885. Mrs. Abbott had been free to go, if she wished to leave without her automobile. Mr. Albertini was not free to go; he was at least 2,000 miles away from home and unable to proceed anywhere without his car. Without his driver's license and automobile registration papers, he was clearly in the shadow of authoritative control. Pursuant to *Abbott*, the Court must conclude that the United States has failed its increased burden of showing a free and uninhibited waiver and consent to search the car and, in particular, to search the structure of the car itself.

The record clearly establishes that the Tenth Circuit erred in its refusal to order the suppression of the contra-

band evidence because there was no voluntary consent to search, there was no consent at all to a search of the structure of the car and the Albertinis were seized on a pretextual ground. These facts make the arrest and search violations of the Constitution of the United States.

CONCLUSION

Mr. Albertini was arrested solely because he is an Hispanic-American from Florida. Had Mr. Albertini not been Hispanic, or have been from any other State, his arrest, and the search of his automobile which led to that arrest, would never have occurred.

Mr. Albertini was convicted by a jury which contained a juror who was a good friend of the policeman who arrested Mr. Albertini.

Mr. Albertini, as any other American citizen, deserves better.

The Supreme Court should take this case because it well presents crucial issues of personal freedom, institutional racial prejudice and the responsibility of federal judges to the principle of fairness.

Respectfully submitted,

DENNIS J.C. OWENS, ESQUIRE
(Counsel of Record)
RAYMOND, RAYMOND & OWENS
1820 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 221-5062
Counsel for the Petitioner

APPENDIX

(Filed September 10, 1985)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

84-1818

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

Appeal From the United States District Court
for the District of New Mexico
(D.C. Criminal No. 84-43-1)

Dennis J. C. Owens of Raymond, Raymond & Owens, Kansas, City, Missouri, for Defendant-Appellant.

David N. Williams, Assistant United States Attorney (William L. Lutz, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before HOLLOWAY, Chief Judge, SETH, Circuit Judge, and BRIMMER, District Judge*.

SETH, Circuit Judge.

Oscar Diaz-Albertini appeals his conviction under 21 U.S.C. § 841(a)(1) for possession of cocaine with intent

*Honorable Clarence A. Brimmer, Chief District Judge for the District of Wyoming, sitting by designation.

to distribute. State police arrested the appellant and his wife after a search at a roadblock uncovered nearly thirty pounds of the drug. The trial court granted a motion for a new trial made by the appellant's wife and denied the appellant's motion. The appellant now asserts that juror prejudice denied him a fair trial and that the police discovered the contraband through an unlawful search.

New Mexico state police officers set up a roadblock near the town of Moriarty to inspect drivers' licenses, insurance and registration papers for New Mexico vehicles. All cars were stopped. A station wagon driven by the appellant was stopped at the roadblock. The appellant had a Florida driver's license. The car's license plates and registration were from California. The appellant's name was not that of the registered owner. The investigating officer directed the appellant to drive the car onto the highway's median. The officer then proceeded to make a NCIC check on the station wagon. The NCIC computer did not list the car as stolen. The officer returned and asked permission to search. The appellant assented verbally. The officer next prepared a written consent to search form which the appellant signed.

After a cursory inspection of the passenger compartment, the officer had the appellant open the tailgate. The officer testified that the appellant had trouble with the keys and his hands were shaking. The officer, upon swinging open the tailgate, felt that it was surprisingly heavy. He knocked on the tailgate; it sounded solid rather than hollow. The officer noted that one corner of the plastic cover on the interior side of the tailgate was loose. When the officer lifted the corner and looked inside he observed a metal plate. The plate was held in place by screws that appeared not to be of factory origin. The officer obtained a screwdriver, unscrewed the metal plate, and discovered a package of cocaine. Thirteen packages of cocaine were removed from the tailgate.

Both the appellant and his wife denied any knowledge of the drugs and claimed they were the unwitting dupes of a man named Tony Montero. The appellant maintained that Montero, posing as a legitimate businessman visiting Florida for the Super Bowl, hired him to drive the car back to California.

The first issue raised by the appellant concerns the asserted bias of one of the jurors. On the morning of the first day of trial the court conducted *voir dire* for two different juries. The jury in the Diaz-Albertini matter was to be chosen first. Another jury was then to be chosen for an unrelated criminal case. Under the method employed by the trial court there could be an overlap between members of the two juries. This turned out to be the case.

During the first round of *voir dire* the court inquired whether any of the veniremen were associated with law enforcement officers. One of the potential jurors, Paul Chavez, remained silent through this entire first round of questioning. He was ultimately chosen as a juror in the Diaz-Albertini case. The appellant's attorney and the wife's attorney then left the courtroom after their jury was selected.

The *voir dire* then began in the unrelated case. During this round of questioning Mr. Chavez responded to one of the court's questions that he was closely acquainted with the state police. There was no follow-up questioning. After the jury was chosen in the second case, the attorneys in that case also left the courtroom. One of them, the Federal Public Defender for the District of New Mexico, talked to the appellant's attorney outside the courtroom. She told him that one of the jurors on his panel, namely Mr. Chavez, stated during *voir dire* in her case

that he was acquanited with state police officers. The Public Defender had been present during the Diaz-Albertini *voir dire* and recognized that Mr. Chavez was one of the jurors selected for that case.

At the subsequent hearings held by the trial judge on motions for a new trial the Public Defender testified that she had then told appellant's attorney:

> " 'There is a juror on your panel, on your jury, who said, in our *voir dire,* that he had a close acquaintance with the state police in Moriarty,' and I may have left it at that or I may have said, 'So you may want to do something about it,' or, 'You may want to get him off your jury,' or something of that nature and I left."

Record, Vol. IX at 14.

The appellant's trial counsel at the hearings never really disputed the Public Defender's version of events. Rather, he argued that he did not recall the exact nature of the problem concerning the composition of the jury. He testified that he decided at the time of the conversation with the Public Defender to examine the transcript of the second *voir dire* "should we have a conviction." Record, Vol. IX at 4. Trial counsel made no attempt to advise the court that there might be a problem and the case went to trial with Mr. Chavez on the jury.

After the jury found the appellant and his wife guilty, both of them moved for acquittal or, in the alternative, for a new trial. The asserted bias of Mr. Chavez was not one of the grounds for the new trial motion. Rather, the motion was based on the sufficiency of the evidence and the search and seizure issues. Some 22 days later the appellant and his wife filed a "Supplement" to the

new trial motion. It was at this late date that the whole issue of Mr. Chavez' bias was first raised. The defendants asserted that their due process right to a fair trial had been denied by the presence of Mr. Chavez on the jury. The trial court held several hearings to resolve the issue.

The court heard testimony from the Public Defender and the appellant's trial counsel on the conversation that took place between them outside the courtroom. The court also questioned the juror. It developed that Mr. Chavez was the godfather of one of the children of the state police officer who testified at the suppression hearing. That officer did not testify at trial. He was, however, the supervising officer at the roadblock and his name was mentioned in the course of the case. Because of the small size of Moriarty, New Mexico Mr. Chavez was also acquainted with several other officers involved in the roadblock and the subsequent search and arrest.

After the hearings the trial court determined that appellant's counsel was put on notice of the problem with the juror before the jury was impaneled and trial began. The court found that counsel made a conscious decision to postpone raising the matter until after a conviction resulted. Accordingly the appellant, through the actions of his counsel, purposefully and knowingly waived his right to object to the presence of the juror.

The court denied the appellant's motion for a new trial. The court however granted the new trial motion made by the appellant's wife. There was no evidence that her attorney had knowledge before trial of the conversation regarding juror Chavez. Appellant now asserts that the trial court abused its discretion in denying his new trial motion. The appellant argues that the juror was clearly biased, and that he did not become aware

of the bias until well after trial so that no waiver occcurred.

The decision in McDonough Power Equipment, Inc. v. Greenwood, ... U.S. ....., 104 S.Ct. 845, indicates that there may be situations where the litigant waives any objection to the composition of the jury by failing to pursue the matter in timely fashion. *Id.* at 847 n. 2. This is consistent with the general rule that a defendant, by accepting a jury, waives his right to object to the panel. Leggroan v. Smith, 498 F.2d 168, 171 (10th Cir.). When the basis for a challenge to a particular juror can be timely shown, the failure to object at the trial's inception constitutes a waiver of the right to attack the composition of the jury. United States v. Harris, 530 F.2d 576, 579 (4th Cir.); United States v. Ragland, 375 F.2d 471, 475 (2d Cir.). This court held in United States v. Ramsey, 726 F.2d 601, 604 (10th Cir.), that when a litigant is aware of alleged juror misconduct during trial it is ineffective to raise the issue for the first time after trial. *See also* United States v. Carter, 433 F.2d 874, 876 (10th Cir.). There is no reason to apply a different standard when the possible bias of a juror is known prior to trial. The litigant cannot transform a tactical decision to withhold the information from the court's attention into a trump card to be played only if it becomes expedient. The duty is to disclose. We have recently reiterated our position that attorneys may not sit idly by, observe the occurrence of error, and then fail to bring the matter promptly to the attention of the trial court. *See* Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184 (10th Cir.); Gundy v. United States, 728 F.2d 484, 488 (10th Cir.). Had the appellant raised the matter promptly the trial court would have had the opportunity to remedy the problem. *See* United States v. Ragland, 375 F.2d 471, 475 (2d Cir.).

After holding hearings the trial court made factual findings pertaining to the conversation between the appellant's attorney and the Public Defender. The court found that the Public Defender told the attorney that Mr. Chavez stated in the second *voir dire* he was closely acquainted with state police officers. We see no reason not to accept this finding. *Cf.* Anderson v. City of Bessemer City, ... U.S. ....., 53 U.S.L.W. 4314, 4317 (March 19, 1985).

The trial court's finding concerning what the Public Defender said is significant on the basic issue. We agree with the trial court that the attorney was then put on notice of potential juror bias and that he chose to wait to see whether there was a conviction before he would use it. This finding fixes the time when appellant became aware of the juror's possible bias.

This notice or awareness was of sufficient specificity to support a conclusion of waiver and to limit the time for a Rule 33 motion. It was not a general hint but as the Public Defender testified this particular juror at *voir dire* stated he had "a close acquaintance with the state police in Moriarty." The trial court found this was a significant matter to Mr. Clay, the trial attorney for appellant. The trial court said: "In fact, Mr. Clay testified he knew it was significant enough that he wanted to look into it after a conviction." Record, Vol. X at 33.

This is the very same point appellant also seeks to raise as "newly discovered evidence" to permit a late Rule 33 motion. But again, the trial court found that Mr. Clay had deliberately withheld the information known before the jury for appellant's case was impaneled. Since it was known before trial the time to raise the point had long passed when appellant's second motion was filed. We must conclude as did the trial court that appellant

waived his right to challenge the presence of this juror on his jury and furthermore the attempt to raise the issue in a late Rule 33 motion must fail.

Appellant next contends that the trial court erred in denying his motion to suppress the fruits of the search. The appellant argues he had standing to challenge the legality of the search, that the roadblock was pretextual, and that coercion tainted his consent.

The trial court found that the appellant had standing. In the absence of any indication that the court's finding was clearly erroneous, we will defer to that determination. United States v. Obregon, 748 F.2d 1371 (10th Cir.). During the suppression hearing the government effectively conceded the issue.

The appellant next asserts that the roadblock was pretextual and violated Delaware v. Prouse, 440 U.S. 648, 663. The Court there stated that

> "except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."

The Court there also stated that its holding did

> "not preclude the . . . [states] from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.*"

Id. (Emphasis added.)

On several occasions this court has approved the operation of roadblocks set up to make routine checks of licenses and registrations. *See* United States v. Obregon, 748 F.2d 1371 (10th Cir.); United States v. Prichard, 645 F.2d 854 (10th Cir.). In both cases we sanctioned the same type of roadblock in the same general area of New Mexico. All cars were stopped except when traffic on the interstate backed up to dangerous proportions. In the present case we can find nothing in the facts to distinguish this roadblock from those found constitutional in *Obregon* and *Prichard*. Thus we conclude the roadblock was not pretextual. Police officers are not required to close their eyes to indications of possible wrongdoing that are disclosed at roadblocks. *See* United States v. Obregon, 748 F.2d at 1376.

Finally, the appellant argues that he did not voluntarily consent to the search of the station wagon. This court has recently examined in detail the legal principles underlying consensual searches and the effects of coercion. United States v. Gonzalez, 763 F.2d 1127 (10th Cir.); United States v. Recalde, 761 F.2d 1448 (10th Cir.).

A warrantless search is, of course, not unreasonable when the party in control voluntarily consents. Schneckloth v. Bustamonte, 412 U.S. 218, 219. Nonetheless, the government has the burden of showing that consent was voluntary. United States v. Mendenhall, 446 U.S. 544, 557. We have recently considered the nature of the government's burden in United States v. Recalde, 761 F.2d at 1453, and earlier in United States v. Abbott, 546 F.2d 883, 885 (10th Cir.). In applying these standards we must conclude that the appellant voluntarily consented to the search. We will accept the findings of the trial court unless they are clearly erroneous. United States

v. Cooper, 733 F.2d 1360, 1364 (10th Cir.). The trial court found that the appellant was an educated individual, fluent in English, and fully capable of understanding the terms and consequences of the consent to search form. The arresting officer testified that the appellant first consented verbally to the initial request to search. This consent was followed by the execution of the written consent form. While the appellant offered a different version of events, the trial court assessed the credibility of the witnesses and the weight to be given their testimony. We will not substitute our judgment on these matters for that of the trial court in the absence of any clear indication the court erred.

There is no indication in the record that the appellant's will was overborne in any way by the police. The record indicates, and the appellant does not dispute, that the police were civil throughout the entire incident. At no time were any threats, implied or express, made. The interval between the initial taking of the appellant's driver's license and the request to search was so short that it cannot be said the kind of implied duress recently condemned in *Recalde* took place.

In sum, the appellant was stopped at a constitutionally acceptable roadblock. The brief initial detention on the highway's median was justified by an articulable and reasonable suspicion that the car might be stolen. The suspicion logically flowed from the discrepancy between the Florida driver's license and the California registration. After the negative NCIC response it was permissible for the officer to ask to search. The appellant freely assented and the contraband was discovered. We find no error in this chain of events.

AFFIRMED.

- JANUARY TERM - March 27, 1987

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges, and Honorable Clarence Brimmer, District Judge*

No. 84-1818

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OSCAR DIAZ-ALBERTINI,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker, Clerk

*of the United States District Court for the District of Wyoming, sitting by designation.

VOLUME I OF II

Criminal Case No. 84-43

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OSCAR DIAZ-ALBERTINI and
THERESE MICHELLE DIAZ-ALBERTINI,
Defendants.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 9th day of March, 1984, at 4:02 o'clock p.m., Hearing on Pending Motions came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[24] OFFICER FAISON

Direct Examination

By Mr. Gomez:

* * *

[25] Q. And could you please tell the Court about the roadblock that was set up on I-40? A. We started at approximately 12:30 in the afternoon on eastbound I-40 and checked traffic eastbound for approximately an hour-and-a-half till around 2:00 o'clock. On the eastbound lane of the roadblock, we issued three citations, two for no driver's license, one for improper equipment.

At about 2:00 o'clock, we changed lanes and proceeded to have a roadblock on the westbound I-40. The roadblock was initially approved by my supervisor, Sergeant Arthur Page.

Q. What was the purpose of the roadblock, sir? A. To check driver's licenses, registrations and insurance on the vehicles that are registered in New Mexico that are required to have insurance.

* * *

[26] Q. And I believe you testified there came a point in time when you changed the roadblock to affect westbound traffic? A. Yes, sir.

Q. And when it was changed over to stop all westbound traffic, did you have an occasion to stop a station wagon that was being driven by Oscar Diaz Albertini? [27] A. Yes, sir.

Q. And what type of station wagon was this, sir? A. It was a white 1979 Chevrolet. As I remember, it was an Impala station wagon.

Q. And was it a car that came up in just a line of traffic as it approached the roadblock? A. Yes, sir.

Q. And did you have initial contact with Oscar Diaz Albertini? A. I believe Sergeant Page, I was caught up in some traffic or something, and he had just stopped the car and he handed me the license and registration to look at, and then he would step back. Basically at the roadblack, if we weren't busy, he would step back and let us conduct it.

* * *

[28] Q. And what happened after Officer Page handed you a document? A. I observed that the driver did not own the vehicle. That the driver had a driver's license showing that he was licensed to drive in Florida,

and that his residence was in Miami. The car was registered in California to, I believe a Terry Montero. Because the driver didn't own the vehicle, I felt it would take a little further investigation. I asked the driver to park the vehicle. Since he was in the left lane, I asked him to park it in the median.

* * *

[29] THE COURT: Go ahead with your next question.

Q. (By Mr. Gomez) And, sir, what happened after you made a determination there was a difference between the Defendant's driver's license and the named registered owner on the car?

* * *

A. I ran an NCIC check on the car and I was advised that it had not been entered in NCIC. I asked him—I approached him and he was still in the car, and I asked him for permission to search the vehicle, and he said I could and he started to get out of the car, I asked him to please wait in the car, and I went back to my unit and filled out a consent to search form in my unit.

Q. Sir, do you know why he was trying to get out of the car? A. To help me go ahead and search the car.

* * *

VOLUME II OF II

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 14th day of March, 1984, at 9:01 o'clock a.m., Hearing on Pending Motions continued before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[21] ARTHUR PAGE

* * *

[26] *Cross-Examination*

By Mr. Clay:

* * *

[32] Q. Ah, when you asked or directed Mr. Albertini to produce a driver's license and registration, he complied with your instruction, didn't he? A. Yes.

Q. And his Florida driver's license was current and valid, was it not? A. Yes.

Q. Okay. And the registration that was produced at your request was current and valid for that particular motor vehicle, wasn't it? A. Yes.

Q. Okay. So, basically, the driver's license and the registration were in order, isn't that correct? [33] A. Yes.

* * *

[36] Q. Now, when you arrived at the roadblock, you became senior officer at the roadblock, is that right? A. Yes.

Q. Prior to your arrival, would Officer Faison have been the senior officer? A. Yes.

Q. When you called Officer Faison over, did you hand him the license and the registration? A. Yes.

* * *

[51] OSCAR DIAZ-ALBERTINI

Direct Examination

By Mr. Clay:

* * *

[55] Q. And at this point in time, are you now off the roadway and onto a grassy median? A. That's correct, sir.

Q. Okay. When Officer Faison took possession of your driver's license and the vehicle's registration, what was your state of mind as to whether or not you were free to go about your travel? A. I didn't think I could go anywhere at that point without my license and the car registration.

Q. After you pulled off the roadway onto the median, where did Officer Faison go? A. He went back to a patrol car which was approximately 10, 15 yards east of where I was parked.

Q. Did there come a time when Officer Faison came back to the vehicle you and your wife were in? A. Approximately three or four or five minutes afterwards, he came back and approached the left-hand side of the car where I was.

Q. So that would be the driver's side of the vehicle? A. That's correct.

Q. Okay. What happened when he came back? [56] A. He had a clipboard, a black clipboard with him, with a sheet of paper on it. He shoved the cleep—the clipboard through the window. He motioned. He signaled to a line. There was a blank line on the bottom. He said, "This is for my protection. I would like you to sign this," and he pointed at where for me to sign it and ordered me to do so.

Q. Did you sign the document that was presented to you? A. Yes, I did, sir.

Q. Okay. Who—From, from where did the pen or pencil that was used to sign this document come? A. Well, he handed me both the clipboard and the pen with his left hand. He handed—Well, he put the clipboard through the window. He never let go of it, and he handed me the pen with his right hand and saying that it was for his protection and if I could please sign down at the bottom, which I did.

Q. Now, what was Officer Faison's tone when he presented this clipboard with the paper to you? A. (No response.)

Q. What was his tone and demeanor? A. He was cordial.

* * *

Q. (By Mr. Clay) And how long did this activity of Officer [57] Faison, presenting you with the clipboard, the pen, pointing out the signature line and telling you to sign, and that this document was for his protection, how long did that activity take? A. Just a few seconds.

Q. Okay. Can you—Can you act out for the Court exactly how it happened in terms of the rapidity or quickness of that event? A. Yes. He approached the window with the clipboard in his left hand and a pen in his right hand. He put the clipboard through the window and

held on to it, but, at the same time, saying, "This is for my protection. Please sign down here," and he motioned to a line on the bottom of the paper and handed me the pen for me to sign.

* * *

[58] Q. Did you have a mental state as to a belief of what the paper was all about? A. Well, I didn't really know what was going on. The last thing that the officer had said to me before going to his patrol car, well, he asked me whether the car was stolen, and when he came back with that form and presented it to me and asked me to sign it, he said, "It's for my protection," I was under the impression that it had something to do with whether the car was, in fact, stolen or not and whether he—it was departmental policy or something for, for him to, to get consent to, to, to do a tag check or, or something to that effect to, to determine whether the car was stolen or not.

Q. Okay. Was is your understanding that Officer Faison's comment, "Sign this for my protection," related to the question he had previously posed to you about whether or not the vehicle was stolen? A. That's the only thing in my mind that it could have related to, because that's what he had been talking about prior to that.

Q. Now, did Officer Faison ever explain to you verbally what was on this piece of paper? A. No, sir.

* * *

[93] THERESE MICHELLE DIAZ-ALBERTINI

Direct Examination

By Mr. Arnkoff:

* * *

[96] Q. After the trooper took the license and registration, what did he do next? A. Well, the first thing that he asked was if the car had been stolen, and my husband immediately said, "No." And then he said, "I'll be back in a minute or two," and he went back to his patrol car.

Q. And what happened when he returned? A. Well, he returned with a clipboard and on the clipboard, there was a form and he leaned it on the window, on the driver's side window, and he said, "This is for my protection. Could you please sign here," and he pointed to a line.

Q. Is that the only thing he said about the form? A. Yes.

Q. Did he explain to you anything about what the contents of the form were? A. No.

Q. Did you get an opportunity to read that form? A. No, I didn't get an opportunity to read the form.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

JURY SELECTIONS

BE IT REMEMBERED that on the 9th day of April, 1984, at 9:45 o'clock a.m., the above-entitled matters came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[14] THE COURT: All right. Is there any reason of any kind, ladies and gentlemen, by virtue of those connections or relationships that would give you any problem being openminded and fair and impartial to both sides?

Is there any reason, ladies and gentlemen, would any of you be inclined to give the testimony of a law enforcement official more weight and credibility than you would another person who is not a law enforcement official simply because the one is a law enforcement official and the other is not? Any reason of any kind why you would be inclined to do so?

I asked about if you were in law enforcement. Aside from that, are you closely associated with or close friends with somebody who's in law enforcement, say your next-door neighbor or something like that? Anybody? I asked about employment or engagement. I just wondered about very close acquaintanceships. All right.

[15] Excuse me. Did I miss somebody? Yes, Mr. Hammond.

JUROR HAMMOND: Your Honor, I'm very well acquainted with the State Police in the Santa Fe District.

* * *

[25] Eddie Baca.
Annabelle Montoya.
Paul M. Chavez.
Felima Archuleta.
Barbara Kailing.
Joan Dodson.
Modesto Cisneros.
Michael Sanchez.
Teresa Codling.
Cidelia Martinez.
Beverly Sanchez.
Carolina Maestas.
Elizabeth Davis.

THE COURT: Ladies and gentlemen, you will constitute the jury to try this cause. * * *

* * *

[30] THE COURT: All right. How about, ladies and gentlemen, are any of you or any immediate member of your family [31] and, once again, I exclude cousins and uncles and all of that, but just children, parents, brother, sister, or spouse of course, are any of you or they now engaged or ever been engaged in law enforcement activity? If you'll just please hold up your hand and for counsel relate what the experience is or was and when.

* * *

(32) THE COURT: Okay. And going on over. Yes, Mr. Chavez.

JUROR CHAVEZ: Close acquaintance with the state police, Your Honor.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

DAY I OF III

BE IT REMEMBERED that on the 9th day of April, 1984, at 11:25 o'clock a.m., Jury Trial came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[29] JEFF FAISON

Direct Examination

By Mr. Svet:

* * *

[39] Q. Now, after you got the consent to search, Officer Faison, what did you do? A. I asked Mr. Diaz-Albertini if he would open the tailgate of the vehicle.

Q. Is that the first place you looked in the vehicle? A. I was looking through the windows at the rest of it; I can't remember if I entered the other part or not, but it was the basis where—as I remember, the first part I started my search of the vehicle.

Q. What, if anything, did Mr. Albertini give you to look through, if anything, before you got to the tailgate? A. I don't remember him giving me anything.

Q. All right. Did he open any of the doors of the vehicle? A. Okay. He, he opened the tailgate—

Q. All right.

* * *

[41] Q. After the tailgate was opened, what did you do? A. I looked around the back area of the station wagon, under the left window, under the right window to see if there was any hidden areas there. And then since he had trouble with the lock, I felt I should check the tailgate and I swung it; the tailgate opens out. It doesn't open down as in a flat manner. It just opens out. And I swung it and it felt heavy to me. It didn't feel in balance. And I tapped (tapping) it and it sounded solid and with the window up and knowing that the window is supposed to go down, at least I believed the window is supposed to go down in there, I thought it should be hollow and it wasn't.

So as the car's going forward, if the tailgate was closed, at the right lower corner, it was a little loose, I pulled the panel up and looked in that area, and in there was some triangular-shaped panels and the one I could see looked a little rusty and I could tell that [42] there was different kinds of screws and not all the screws were there and, to me, it didn't look like a factory installation. This, this—The metal didn't match the rest of the metal in the car. My impression was that it either had been tampered with and I didn't really think it was factory installation at the time.

So I went back to my car and got some screwdrivers and was able to pull the panel out, not completely ripped it off, but enough to get the metal screws out of the triangle-shaped panel on that one side off, and I was able to reach in any I located a package inside a plastic bag. And based on past experience, I believed that was cocaine.

* * *

[60] *Cross-Examination*

By Mr. Clay:

* * *

[61] Q. Isn't it also correct, Officer Faison, that you and the other officers at the roadblock did not have any type of a tip that this vehicle or its occupants were involved in any kind of criminal activity? A. Correct.

Q. Okay. So, in essence, the stopping of the vehicle that Mr. and Mrs. Albertini was in, was routine, routine roadblock procedure? A. Yes, sir.

* * *

[71] Q. After you found the package and after you confronted Mr. and Mrs. Albertini with the package and asked them or asked the question if they know of anything about the package, then you put the Albertinis under arrest and took them to your police car; is that right? A. Yes, sir.

Q. And at the police car, you advised them of their Miranda warnings, is that right? A. Yes, sir.

* * *

[138] THERESE MICHELLE DIAZ-ALBERTINI

Direct Examination

By Mr. Arnkoff:

* * *

[154] Q. All right. Did you or your husband have any objections to—offer any objections to Officer Faison— A. No.

Q. —about searching the car? A. No.

Q. What was it that you felt he was trying to effectuate by searching the car? A. I don't know. Nowadays, you read so many things in the paper. There's so many reasons why they search a car, I guess. I've never been in that position. I have no idea, to be honest with you.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

DAY II OF III

BE IT REMEMBERED that on the 10th day of April, 1984, at 9:00 o'clock a.m., Jury Trial came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[31] OSCAR DIAZ-ALBERTINI

Direct Examination

By Mr. Clay:

* * *

[55] Q. Okay. What did Officer Faison do after he came back to the vehicle you and your wife were in? A. Well, after he came back, he had a clipboard with him and he had a piece of paper on it and he had handed me the clipboard; he put it through the window and gave me a pen. He motioned to a signature line on the bottom of the sheet of paper and he asked me to sign it. He said it was for his protection.

Q. Did you sign the document? A. Yes, I did.

Q. Okay. What happened next? A. Right after that, he said to me, "Get out of the car. I'm going to search it." And we did, and I opened the second door behind—well, the door behind the driver's side and I started pulling out my luggage to—thinking that he wanted to look through it, so I started to take * * *

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 11th day of May, 1984, at 12:30 and 3:30 o'clock p.m., Hearing on Defense Motion for New Trial and Counsel Conference came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[4] THE COURT: I thought that some or all of you were present during the, the—

MR. CLAY: No, Your Honor.

MR. ARNKOFF: No, Your Honor.

MR. CLAY: Neither Mr. Arnkoff or I and Mr. Serna or our clients were present and I don't believe Government counsel in the Albertini case was present.

THE COURT: All right. From the Largo defense counsel, who was that?

MR. CLAY: Largo defense counsel was the Public Defender's Office.

MR. SVET: Yes.

THE COURT: All right. And when did they advise you of that?

MR. CLAY: When we were coming back to the courtroom for opening statement, I believe, the Public Defenders were leaving the courtroom and it's at that time that I learned that the jurors we had picked stayed in the pool to be possible jurors in the Largo case; and

the exact conversation that I had with the Public Defenders, I don't recall but whatever it was, it led me to believe that we should take a look at the transcript, should we have a conviction, to see what the jurors in our case said in the jury selection in the Largo case. And Mr. Arnkoff and I, after going through the * * *

* * *

[6] THE COURT: Because, quite obviously, it's obvious on the surface of it that the Court is curious, this did not occur to you after the case was over and it occurred to you before, while there was something that could be done about it.

MR. CLAY: Your Honor, I would say that my mental state was that, first of all, Mr. Arnkoff and I were already discussing jury selection in that neither of us had been through an experience of this type of jury selection in the past,—

* * *

MR. CLAY: Your Honor, may I explain that conversation as best I recall. It was quick because we were coming in for our opening statements and the public Defenders were leaving. I think I kind of passed by the Public Defenders in the outer lobby and the conversation couldn't have lasted very long at all.

THE COURT: Doesn't have to last very long to be significant and it wouldn't last very long to come in and tell the Court.

MR. CLAY: Well, I would say it was significant [7] enough that after a conviction, it would be further cause for Mr. Arnkoff and I to order a transcript of both jury selections, but we had planned to do that anyway, due to the fact that this jury selection, by our experience, was somewhat unusual.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Caption Omitted In Printing]

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 1st day of June, 1984 at 11:27 o'clock a.m., matters came on before THE HONORABLE HOWARD BRATTON, Chief United States District Judge, sitting at Albuquerque, New Mexico.

* * *

[16] THE COURT: But you've known Sergeant Page off and on for quite a few years and had been good friends with him for a number of years?

[17] MR. CHAVEZ: I've known Sergeant Page for 20 years and I've known Sergeant Bibiano for 16 years.

MR. CLAY: Your Honor, may I ask a few questions?

THE COURT: Yeah, very—

MR. CLAY: Mr. Chavez, do you have any family relationship with Sergeant Page or any other New Mexico police officer, state police officer?

MR. CHAVEZ: Any what?

MR. CLAY: Any family relationship with any—

MR. CHAVEZ: No.

THE COURT: Sit down up here, Mr. Clay. It will be a little easier. Why don't you.

MR. CLAY: Do you have any member of the state police that is in an in-law capacity to you, related to you in that fashion?

MR. CHAVEZ: No.

MR. CLAY: Do you know Officer Jeff Faison who was one of the witnesses that testified in the Albertini case?

MR. CHAVEZ: I do.

MR. CLAY: How long have you known him?

MR. CHAVEZ: Well, he's been in Moriarty I believe about six or seven—five, six years.

MR. CLAY: Have you known him that whole time?

MR. CHAVEZ: Yeah, but he's not a personal friend.

MR. CLAY: Do you know Officer Sherman Toler who [18] did not testify in the Albertini trial but was mentioned?

MR. CHAVEZ: I've seen him. I've talked to him. Just "Hello" but never a conversation.

MR. CLAY: Approximately how long have you known him?

MR. CHAVEZ: Well, he's been in Moriarty about four or five years, too.

MR. CLAY: And do you know New Mexico State Police Officer Tom Christian?

MR. CHAVEZ: Yes, I do.

MR. CLAY: Okay. Now, he did not testify in the trial but his name was mentioned also.

MR. CHAVEZ: (Nods head.)

MR. CLAY: You say you've known him four to five years?

MR. CHAVEZ: Tom Christian? I've known him since he was stationed in Wagonwheel and that's been about five, six years.

* * *

[19] MR. CLAY: Do you socialize with Sergeant Page?

MR. CHAVEZ: Yes, I do.

MR. CLAY: Okay. Frequently?

MR. CHAVEZ: Well, we baptized one of their babies.

MR. CLAY: Does that mean you would be kind of like a godfather—

MR. CHAVEZ: I am, yes.
MR. CLAY: —to Sergeant Page's child?
MR. CHAVEZ: Yes.

* * *

[31] Let me say, on that subject, I will give you the answer in the beginning.

I will order a new trial for Mrs. Diaz-Albertini.

[32] The Motion for a New Trial as to the Defendant, Oscar Diaz-Albertini, will be denied.

Here are the reasons. I find that there was a conscious waiver by Mr. Diaz-Albertini's counsel as to any impropriety or misanswer by the juror in question. I find that the facts as to what happened were as testified to by Ms. Indritz. As a matter of fact, there is really no contradiction of her version of the facts. On Pages 14 and 15 of the transcript, she sets out her recollection as to the conversation between her and Mr. Clay, after both voir dires in the Albertini and Largo cases were concluded, and as she was going out the door and Mr. Clay was coming back in the door to commence the Diaz-Albertini trial, she states what she told Mr. Clay and it's summed up very succinctly. When I asked her "Did you tell him—You did tell him that he had a juror on his case who had said in your case he was a close friend of the state policeman in Moriarty?" And she said, "Yes." She also went on there to say she may have left it at that or she may have added "So you may want to do something about it or you may want to get him off your jury." I think that's—knowing Ms. Indritz and her thoroughness, I'm quite satisfied that she did go on to make that suggestion. It is certainly something she would do. She relayed that information to Mr. Clay before the jury was impaneled; the counsel were coming back in. I never, of course, impanel a jury, could not impanel [33] a jury

without the Defendants and counsel being present, so it was prior to the time that the jury was impaneled. Mr. Clay knew and made a conscious decision to not do anything about it at that time. In fact, Mr. Clay testified he knew it was significant enough that he wanted to look into it after a conviction. Well, that will not stand up under the *McDonough-Greenwood* case. That is, in my judgment, a conscious decision where he had a basis for going further and looking in to the juror and getting the juror excused and deciding to do nothing about it until after conviction; that's getting in effect a free bite at the apple. * * *

* * *

(2)

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1889

In the Supreme Court of the United States

OCTOBER TERM, 1987

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15pp

QUESTIONS PRESENTED

1. Whether petitioner waived his right to challenge for possible bias the presence of a particular juror on his jury.

2. Whether a police search of petitioner's vehicle at a document-check roadblock violated the Fourth Amendment when petitioner consented orally and in writing to the search.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Delaware v. *Prouse*, 440 U.S. 648 (1979)	8
Florida v. *Royer*, 460 U.S. 491 (1983)	9
McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984)	6
Meadows v. *State*, 266 Ark. 380, 602 S.W.2d 636 (1980)	10
Nakamoto v. *Fasi*, 64 Hawaii 17, 635 P.2d 946 (1981)	9
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977)	9
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1945)	10
United States v. *Abbott*, 546 F.2d 883 (10th Cir. 1977)	11
United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976)	8
United States v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977)	9
United States v. *Schiavo*, 504 F.2d 1 (3d Cir.), cert. denied, 419 U.S. 1096 (1974)	7
United States v. *Sharpe*, 470 U.S. 675 (1985)	9
United States v. *Villamonte-Marquez*, 462 U.S. 579 (1983)	8

Constitution, statute and rule:

U.S. Const. Amend. IV	7, 8
21 U.S.C. 841 (a) (1	2
Fed. R. Crim. P. 33	5

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1889

OSCAR DIAZ-ALBERTINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 772 F.2d 654.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1985. A petition for rehearing was denied on March 27, 1987 (Pet. App. A11). The petition for a writ of certiorari was filed on May 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Mexico, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to ten years' imprisonment and a special parole term of five years.

1. The district court held a pretrial hearing on petitioner's motion to suppress approximately 30 pounds of cocaine that was found in a vehicle he was driving. At that hearing, the government established that on January 30, 1984, New Mexico state police officers were stopping all cars at a roadblock near the town of Moriarty, New Mexico. Among the cars stopped was the station wagon petitioner was driving, in which petitioner's wife was riding as a passenger. The purpose of the roadblock was to inspect driver's licenses, license plates and registrations on all cars, and proof of insurance on vehicles registered in New Mexico. Pet. App. A2.

At the request of a police officer at the roadblock, petitioner produced his Florida driver's license and the registration form for the station wagon, which was registered in California. The registration form listed another person as the owner. A police officer then asked petitioner to park his car on the highway's median. After petitioner had done so, the police ran a computer check on the station wagon to determine if it was stolen. After the computer check proved negative, the officer asked petitioner if he would con-

---

[1] Co-defendant Michelle Diaz-Albertini (petitioner's wife) was also convicted of possession of cocaine with intent to distribute it. The district court subsequently granted her motion for a new trial.

sent to a search of the vehicle. Petitioner consented orally and also signed a written consent form. Pet. App. A2.

During the search, one of the officers noticed that petitioner had difficulty in opening the tailgate of the car. The officer examined the tailgate and noticed that it felt heavy and that, when it was tapped, the tailgate sounded solid rather than hollow. The officer then lifted the corner of the plastic cover on the interior side of the tailgate and noticed some metal plates, which did not appear to be factory installed. The officer unscrewed the metal plates and discovered packages containing approximately 30 pounds of cocaine secreted behind the plates. Pet. App. A2.

The district court denied petitioner's motion to suppress the cocaine (Pet. App. A8). The court rejected petitioner's claims that the roadblock was pretextual and that petitioner's consent was the product of unlawful coercion (*ibid.*). The court found that petitioner made a knowing, intelligent, and voluntary consent to the search of his car (*id.* at A10).

2. On the morning of the first day of trial, the district court judge conducted *voir dire* examinations for a jury first in petitioner's case and afterwards for a jury in an unrelated criminal case. There was an overlap in the venire for the two juries. During the *voir dire* for petitioner's trial, the court asked whether any of the veniremen were closely associated with anyone in law enforcement. One of the veniremen, Paul Chavez, who was ultimately chosen as a juror in petitioner's case, remained silent during the questioning. Petitioner's attorney and his wife's attorney left the courtroom after their jury was selected. During the *voir dire* that same morning in the unrelated criminal case, Mr. Chavez stated in re-

sponse to a question posed by the court that he was closely acquainted with certain members of the state police. Pet. App. A3.

Following jury selection in the second case, the Federal Public Defender for the District of New Mexico, who was representing a defendant in that case, informed petitioner's counsel outside the courtroom that there was a juror on his panel who had stated, during the *voir dire* in the second case, that he was closely acquainted with the state police in Moriarty (Pet. App. A3-A4). The public defender also may have advised petitioner's counsel " 'to do something about it' " or " 'to get him off your jury' " (*id.* at A4). At that time, the jury in petitioner's case had been selected, but not yet sworn (*id.* at A5, A30-A31). After the conversation, petitioner's counsel made a note to himself to review the *voir dire* transcript "should we have a conviction" (*id.* at A4). Petitioner's counsel made no attempt to advise the court of the potential problem prior to trial (*ibid.*).

Following their convictions, petitioner and his wife moved for a new trial on the ground that juror Chavez was biased against them. At a hearing on that motion, the district court heard testimony from the public defender and petitioner's counsel concerning the conversation that took place between them after the second *voir dire*. The court also questioned juror Chavez. Pet. App. A4-A5.[2]

---

[2] At the hearing, juror Chavez testified that he was the godfather of one of the children of a police officer who was at the roadblock. The officer in question was mentioned at trial but did not testify. Chavez also testified that because of the small size of Moriarty, New Mexico, he, like most members of the community, was acquainted with several other officers who were involved in the roadblock and in the subse-

Following the hearing, the district court denied petitioner's motion for a new trial due to juror bias. The court ruled that the motion was not timely filed and, in any event, lacked merit. The court concluded that petitioner's counsel had waived any claim concerning juror Chavez's failure to respond to the *voir dire* question posed in petitioner's case concerning his acquaintance with any member of the state police. The court stressed that petitioner's counsel had notice of the problem before the jury was sworn and made a tactical decision to postpone raising the matter until after conviction. The court granted the new trial motion made by petitioner's wife because there was no conclusive evidence that her attorney similarly had knowledge before trial of juror Chavez's possible bias. Pet. App. A5, A30-A31.

3. The court of appeals affirmed (Pet. App. A1-A10). The court held (*id.* at A6) that because petitioner's counsel was put on notice of potential juror bias prior to trial but did nothing about it, he had deliberately waived his right to raise the matter following petitioner's conviction. The court also ruled (*id.* at A7) that petitioner's motion pursuant to Fed. R. Crim. P. 33 for a new trial based on "newly discovered evidence" was out of time, because petitioner's counsel was aware of the problem before trial. The court of appeals also upheld (Pet. App. A8-A10) the search of petitioner's car and the seizure of the cocaine.

---

quent search and arrest of petitioner and his wife. Pet. App. A5, A28-A31.

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the presence of juror Chavez on his jury deprived him of his right to an impartial jury because the juror did not reveal during *voir dire* that he was personally acquainted with several of the officers involved in petitioner's case. The court of appeals correctly rejected this claim.

Petitioner concedes (Pet. 10) that a defendant may waive any objection to the composition of the jury by failing to pursue the matter in a timely fashion. See *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 550 n.2 (1984). Petitioner contends (Pet. 10-11) that there was no proof of a waiver in this case because there was no "convincing evidence" that either he or his lawyer was aware before petitioner's trial of the possibility of juror bias. The district court, however, found otherwise based on the court's examination of the public defender and of petitioner's counsel during a post-conviction hearing. The district court found (Pet. App. A30-A31) that petitioner's counsel was aware of the possible juror bias prior to the time the jury was sworn and made a conscious, tactical decision to raise the matter only if a conviction should result. The court of appeals reviewed those factual findings and, like the district court, concluded (Pet. App. A5) that the record showed that petitioner, through his counsel, "purposefully and knowingly waived his right to object to the presence of the juror." The factual finding of waiver is fully supported both by the uncontradicted testimony of the public defender that she alerted petitioner's counsel and by the testimony of petitioner's counsel that he, in effect, decided to pursue the matter only if his client was ultimately

convicted (see *id.* at A4). Petitioner's factbound assertion that those findings were in error does not warrant this Court's review.[3]

2. Petitioner also argues (Pet. 14-24) that the court of appeals erred in upholding the district court's denial of petitioner's motion to suppress the cocaine that was seized from the station wagon. Petitioner's Fourth Amendment rights were not violated, however, and the cocaine was properly admitted into evidence.

a. Contrary to petitioner's assertion (Pet. 14-15), petitioner's Fourth Amendment rights were not violated by the initial roadblock stop of his vehicle. The roadblock was established to check driver's licenses, registration forms, and insurance papers. It was therefore a legitimate exercise of the State's authority to ensure safety on the road. No reasonable suspicion of criminal activity is necessary to maintain such a roadblock and no problem of pretext is pre-

---

[3] Petitioner also asserts (Pet. 13-14) that the district court judge, who was present at both *voir dire* examinations, should have notified petitioner's counsel of juror Chavez's possible bias. That claim lacks merit. It is not reasonable to expect a judge, who (as in this case) may conduct multiple *voir dire* examinations in a single day, to ensure the consistency of an individual venireman's responses in all those examinations. For this reason, contrary to petitioner's suggestion (Pet. 13), the decision of the court of appeals in this case does not conflict with *United States* v. *Schiavo*, 504 F.2d 1, 6 (3d Cir.), cert. denied, 419 U.S. 1096 (1974), which stated only that a court must take "reasonable measures" to preserve the fairness of a trial. In any event, a defendant certainly cannot complain of the court's failure to notify him of possible juror bias where, as in this case, the defendant is otherwise alerted to the problem and makes a tactical decision not to raise it until after the jury's verdict.

sented because the roadblock stopped "all oncoming traffic." See *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557 (1976). Significantly, the district court heard testimony from petitioner and from the police at a pretrial hearing and specifically found that the police stop of petitioner's car was pursuant to a routine check of all incoming traffic, and was not pretextual (Pet. App. A8; IV Tr. 5-6). As the court of appeals held (Pet. App. A9), those findings were fully supported by the record. Petitioner's challenge to that factual finding merits no further review.[4]

b. The computer check by the state police of the station wagon's registration also did not violate petitioner's Fourth Amendment rights. The police had sufficient cause to perform the computer check after they learned that petitioner had a Florida driver's license and was driving a car that had California license plates, was registered in California, and was not owned by petitioner or anyone else present. The computer check did not result in petitioner's unlawful "arrest" (Pet. 18); petitioner was simply the subject of a legitimate, temporary stop that was justi-

---

[4] Petitioner's contention (Pet. 15-16) that the roadblock stop was "illegitimate" because his vehicle had a California (and not New Mexico) license plate and because New Mexico state police officers had training on the subject of narcotics detection on the highway is unavailing. The authority of the state police to stop vehicles at a routine highway safety check is not limited to those vehicles with in-state license plates. Nor does the fact that police are generally trained to spot unlawful activity, including possession of illicit narcotics, render unlawful otherwise lawful routine police investigatory stops. See *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).

fiable for its limited purposes. See *United States* v. *Sharpe*, 470 U.S. 675, 682-686 (1985); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109-111 (1977).

For this reason, petitioner is wrong in asserting (Pet. 16) that, regardless of the validity of his consent to the search of the station wagon, the search was the product of an unlawful detention. Unlike *Florida* v. *Royer*, 460 U.S. 491 (1983), upon which petitioner relies (Pet. 18-19), petitioner's detention was lawful in all respects. Hence, unlike *Royer* (see 460 U.S. at 507-508 (plurality opinion); *id.* at 509 (Brennan, J., concurring)), there was no initial police misconduct that could have tainted the subsequent consent and the seizure of the cocaine.

c. Finally, petitioner claims (Pet. 20-24) that his consent to the search was invalid because the police lacked any "reasonable or articulable suspicion" to justify seeking consent in the first instance and because petitioner's consent was in any event involuntary. Both grounds lack merit.

First, there is no threshold constitutional requirement that the police possess a "reasonable or articulable suspicion" prior to asking if an individual is willing to consent to a search. The Fourth Amendment requires only that the stop be lawful, which it was, and that the consent be voluntary.[5]

---

[5] The support petitioner cites for the contrary view is inapposite. *United States* v. *McCaleb*, 552 F.2d 717, 720-721 (6th Cir. 1977), stands only for the proposition that when the government seeks to rely upon consent to justify the lawfulness of a search, the government has the burden of proving that the consent was voluntary and was not the fruit of an illegal arrest. The two state court cases upon which petitioner relies also do not remotely support his contention. The court in *Nakamoto* v. *Fasi*, 64 Hawaii 17, 22, 635 P.2d 946, 951

Second, both the court of appeals and the district court correctly rejected petitioner's claim that his consent was involuntary. Further review of petitioner's factbound allegation to the contrary is unwarranted. It is well settled that the voluntariness of consent in a specific case is a question of fact to be determined from the "totality of the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1945)). As the court of appeals noted (Pet. App. A10), the district court in this case "found that [petitioner] was an educated individual, fluent in English, and fully capable of understanding the terms and consequences of the consent to search form." The district court heard the testimony of both petitioner and the police officer, who testified that petitioner consented both orally and in writing; the court assessed their credibility; and the court concluded from the evidence before it that the consent had been voluntarily obtained (*ibid.*). The court of appeals reviewed those factual findings for clear error and likewise concluded (*ibid.*) "[t]hat there is no indication in the record that [petitioner's] will was overborne in any way by the police." The court of appeals further observed (*ibid.*) that the police were civil during the incident, that they made no threats (implied or expressed), and that the time between the initial taking of petitioner's driver's license and the consent to search was so short that

---

(1981), held only that a state may not condition entry to a rock concert at a city-owned site upon submission to a search. In *Meadows* v. *State*, 266 Ark. 380, 602 S.W.2d 636 (1980), the court simply ruled that evidence of illegal drugs discovered during a search incident to an improper arrest is not admissible against the defendant.

there was no basis from which to infer that petitioner's consent was the product of duress.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

DEBORAH WATSON
Attorney

JULY 1987

---

[6] Relying on the Tenth Circuit's prior decision in *United States* v. *Abbott*, 546 F.2d 883 (1977), petitioner argues in the alternative (Pet. 22-24) that his consent to the search, even if uncoerced, did not extend to the discovery of cocaine within the tailgate itself. Unlike in *Abbott*, however, petitioner was present throughout the search, including the search of the tailgate, and petitioner never indicated that his consent did not extend to the tailgate. Contrary to petitioner's claim (Pet. 23), moreover, the officer's careful examination of the tailgate is not analogous to destructive police activities such as "break[ing] into the plaster wall of [a] house." Petitioner's argument that the officer exceeded the scope of petitioner's consent is therefore wholly unpersuasive.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40446